

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
TIMOTHY WAYNE ARNETT,
Defendant-Appellant.

No. 00-10170
D.C. No.
CR-95-05287-REC

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
TIMOTHY WAYNE ARNETT,
Defendant-Appellant.

No. 00-30189
D.C. No.
CR-95-60120-HO
ORDER

Filed December 24, 2003

Before: Mary M. Schroeder, Chief Judge; Stephen Reinhardt,
Pamela Ann Rymer, Thomas G. Nelson, Susan P. Graber,
Raymond C. Fisher, Ronald M. Gould, Richard A. Paez,
Richard C. Tallman, Johnnie B. Rawlinson, and
Jay S. Bybee, Circuit Judges.

ORDER

On November 25, 2003, only two weeks before these eight-year-old cases were scheduled for oral argument before this en banc court, the United States filed a supplemental brief in which it confessed error on the collateral estoppel issue:

In federal criminal trials, the United States may not use collateral estoppel to establish, as a matter of

law, an element of an offense or to conclusively rebut an affirmative defense on which the Government bears the burden of proof beyond a reasonable doubt.

In our Case No. 00-10170, the confession of error affects each of the counts charging use of a firearm during a crime of violence, which are Counts 2, 4, 6, 8, 10, 12 and 14. The convictions on those counts are REVERSED, and the case is REMANDED for retrial or other appropriate disposition of those counts. The convictions on Counts 1, 3, 5, 7, 9, 11, 13 and 15 are AFFIRMED. The sentence imposed in the judgment filed on March 29, 2000, is VACATED pending further proceedings on remand.

The memorandum disposition filed on April 24, 2003, which was withdrawn by this court's order of October 3, 2003, is hereby reinstated. Any sentencing issues raised under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), may be considered as necessary on remand.

The judgment in Case No. 00-10170 is AFFIRMED in part, REVERSED in part, VACATED in part, and REMANDED.

The judgment in Case No. 00-30189 is AFFIRMED in all respects.

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